IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 317 of 2003
WITH
CRIMINAL APPEAL No. 393 of 2003
WITH
CRIMINAL APPEAL No. 394 of 2003
WITH
CRIMINAL APPEAL No. 395 of 2003
WITH
CRIMINAL APPEAL No. 917 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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MUKESHKUMAR MANGILAL ACHARYA - Appellants
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MS SADHANA SAGAR for Appellants.
MR KT DAVE, APP for Opponent.

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CORAM :	HONOURABLE MR.JUSTICE A.M.KAPADIA
	and
	HONOURABLE MR.JUSTICE K.A.PUJ

Date : 14/03/2007

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. The appellants – original accused Nos. 1 to 5 have filed these appeals under Section 374 (2) of the Criminal Procedure Code, 1973 (for short 'the Code') against the judgment and order of conviction and sentence dated 10.03.2003 rendered by the learned Joint District Judge and Additional Sessions Judge, Fast Track Court No. 3, Bharuch in Special (NDPS) Case No. 03 of 2001 convicting the appellants – original accused Nos. 1 to 5 for the offences punishable under Section 17 & 18 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and sentencing them to suffer R.I of 10 years with fine of Rs.1 lac each (Rupees One Lac Only) and, in default of payment of fine, further R.I of 2 years for each of the

offences with a further direction that all the substantive sentences shall run concurrently.

2. Briefly stated, the prosecution case as disclosed from the complaint as well as unfolded during trial, is as under :-

3. Mr. G. N. Chavda, P.I., LCB Bharuch lodged complaint on behalf of the Government that on 23.06.2001, according to the information received by him from the Police Superintendent, Bharuch, five Rajasthani persons out of whom the name of one person is Mukeshkumar and four others were coming with an unauthorised quantity of opium in a bag near hotel Parvana on the national Highway No. 8 going from Bharuch to Vadodara at about 7.00 O'clock in the evening and they were trafficking quantity towards Surat or Mumbai. Mukeshkumar, out of the said persons, has put on white-blue colour shirt and blue colour pant. One person is having bald head. One is having white beard. He made an entry in the movement register with an instruction to take follow-up action on the basis of the said information. A report was made under Section 42 (1) of the NDPS Act to the Police Superintendent, Bharuch. PSI Shri K.D.

Pandya, PSI Shri S.G. Basia of LCB, ASI Shri U.K. Tadvi of LCB Bharuch, a Head Constable Karsanbhai Ratanji, a Police Constable Rajendra Ranjitsinh, a Police Constable Vikramsinh Udeshinh, a driver Police constable Kanubhai Ranchhodbhai, ASI Shri P.Z. Patil, Shri M.N. Vasava, a Police Constable Ramesh Parshottambhai and a driver Police constable Devabhai Shivabhai started in the Government vehicles bearing NO. GJ-16G-9836, GJ-1G-3739 and GJ-1G-247.

4. The Panch (1) Rajesh Mohanlal Modi residing at Jhadeshwar Tal. Dist. Bharuch and (2) Prakashchandra Thakorlal Modi residing at 35, Shivshakti Nagar Jhadeshwar, Tal. Dist. Bharuch were called upon at Narmada Cross road on National Highway No. 8 Bharuch. They were appraised about the information. A search was made in the said vehicles and on the persons of aforesaid Police Officers and the complainant himself. Nothing offendable was found. A preliminary panchnama for this part was completed between 18.10 to 18.40 hours. Then they started for the Hotel Parvana and stopped the vehilcles at a distance of one furlong from the Hotel Parvana and walked down towards Parvana

Hotel. Out of the persons described under information, the description of three persons was appeared to be proper near the board 'All India Vahan Chalak Sangh". All the five persons were stopped.

5. The complainant and others introduced themselves to the said five persons and asked their names and addresses. They stated the same to be (1) Mukeshkumar Mangilal Acharya, who had the handle bag on his shoulder residing at Lakhola, Acharya Maholla, Tal. Sada, Dist. Bhilwada (Rajasthan), (2) Bhaktavarlal Bhagirathji Gadri, having beard, residing at Samrathpura, Tal. Kapasan, Dist. Chitodgadh (Rajasthan), (3) Bherulal Chhittarji Gadri residing at Samrathpura, Tal. Kapasan, Dist. Chitodgadh (Rajasthan), (4) Hemraj @ Hamo Rupaji Bhil, having bald head, residing at Singpur, Tal. Kapasan, Dist. Chhitodgadh (Rajasthan) and (5) Chhaganlal Pannala Acharya residing at Singpur Acharya Maholla, Tal. Kapasan, Dist. Chitodgadh (Rajasthan). The complainant explained them in Hindi language that he was a Gazetted Police Officer and are they willing to be searched on person by him in presence of the Panchas ? Whether

they want to be searched in presence of a Magistrate or another Gazetted Officer ? Such an officer can be called. So all the five persons expressed desire to be searched on person in presence of the panchas. At first the complainant, the panchas and other officers got themselves searched on person to the said five persons wherein no offendable was found.

6. Thereafter, it was decided by an order u/S. 42 of the NDPS Act regarding the search of the said five persons and it was clearly explained to them and the signatures of the panchas and the signatures of four out of five persons were taken and the thumb impression of accused No. 4 was taken.

7. At first, the search of accused No. 1 was made and nothing offendable was found from his person but looking into his bag, Reebok was returned thereon and it has chains of mixing colours-brown, yellow and green. A dirty white colour handkerchief with pink coloured strips and a bound plastic bag filled with mild black substance was found. It's smell was extreme and typical. He and other four persons confirmed it to be opium. Necessary

license or permission was demanded and accused No.1 and the four others denied. Therefore, Head Constable Karsanbhai Ratanji was sent in GJ-1G-3739 to call a Photographer and weigher as unauthorised quantity was found.

8. In the meantime, the search was made on other four persons and no offendable or psychotropic substance was found from them. Head constable Karsanbhai Ratanji returned with a weigher with instruments and he stated that a photographer was not available. A search was made by the said five persons and the panchas on the person of the head constable Karsanbhai, the driver Police constable Kanubhai Ranchhodbhai of GJ-1-G-3739, the weigher Vinod Ramvir Kathiria residing at behind Sarasvati Talkies, Bharuch who came with measures, prior to weighing. No offendable article was found. As the photographer was not available, the Police Constable Rajendra Ranjitsinh was asked to take photographs with the Government camera. Then the weighing process was started and 7.250 Kgs. and 7.800 Kgs. quantity of opium was there in both small bags respectively. The sample of 20 – 20 Grams were taken from both small bags. The

first bag was given Mark A and its two samples were given Mark A/1 and A/2 and the second bag was given Mark B and its samples were given Mark B/1 and B/2. Both the original small bags and handkerchief were placed in a bag and chained. All the samples were kept in different plastic small boxes and covered with cloth and stitched and the slips bearing signatures of the panchas and the complainant and PSI Shri K.D. Pandya and S. G. Basia were kept therein. Each sample was tied with a string and the waxing seal of 'P.S.I. L.C.B. BHARUCH' was affixed thereon and the same was seized.

9. Considering the rate of opium at Rs.30,000/- per Kg., the total value of unauthorised 15.50 Kgs. opium, which was found, was considered to be Rs.4,51,500/-. A panchnama in this respect is prepared between 18.10 and 22.00 hours in presence of the PSI Shri K. D. Pandya and PSI Shri S. G. Basia.

10. Thus, the five persons with consent of each other, have kept 15.50 Kgs. unauthorised opium in the bag of No. 1 with an intention of international trafficking as

mentioned in his complaint. Therefore, there being violation of prohibition under Section 8 (c) of the NDPS Act. His complaint is against the said five persons under Sections 17, 18 & 29 of the NDPS Act. His witnesses are the panchas and the police officers etc. mentioned in the complaint.

11. After filing of the complaint, the investigation was put into motion. During the course of investigation, the muddamal was sent to FSL for analysis and Investigating Officer recorded the statements and on receipt of the report from the FSL certifying that the muddamal sent for analysis was opium and as incriminating evidence was found against the appellants – original accused Nos. 1 to 5, they were charge-sheeted before the learned Joint District & Additional Sessions Judge, Bharuch under Sections-17 & 18 read with Section 29 of the NDPS Act.

12. The learned Joint District & Additional Sessions Judge, Bharuch to whom the case was made over for trial, framed charge against the appellants – original accused Nos.1 to 5 for commission of the offence punishable under Sections 17, 18 & 29 of the NDPS Act which was

read over and explained to them. As the accused pleaded not guilty to the charge and claimed to be tried, they were put to trial and tried in Special (NDPS) Case No. 03 of 2001.

13. To prove the culpability of the accused the prosecution has examined and relied upon the evidence of as many as 12 witnesses, details of which are given in para-5 of the impugned judgment and order and the same are as under :-

Sr. No.	Particulars	Exh. No.	Page No.
1	P.W No. 1 – Gopalbhai Nathabhai Chavda.	26	105-107
2	P.W No. 2 – Rajeshbhai Mohanbhai Modi.	45	141-145
3	P.W No. 3 – Prakashchandra Thakorlal Modi.	53	149-151
4	P.W No. 4 – Siraj Gulam Saleh.	54	152-154
5	P.W No. 5 – Vinodbhai Ramvir	57	156-160
6	P.W No. 6 – Kersanbhai Ratanjibhai	59	161-166
7	P.W No. 7 – Rajendra Ranjitbhai	64	167-171
8	P.W No. 8 – Kaushikbhai Dinkarrai	70	178-185
9	P.W No. 9 – Javid Abdulla.	73	188-189
10	P.W. No. 10 – Babubhai Prabhubhai.	74	190-191
11	P.W. No. 11 – Mohanbhai Jivabhai Rathod	77	193-194
12	P.W. No. 12 – Aziz Ahmadkhan Firozkhan	81	197-201

14.To prove the case against the appellants – original accused Nos. 1 to 5, the prosecution has also produced and relied upon number of documents, details of which are in para-6 of the impugned judgment and order, which are as under :-

Sr. No.	Particulars	Exh.No.	Page No.
1	Charge	14	31-32
2	Complaint	27	118-120
3	Yadi to FSL	29-30	122-125
4	Panchnama	47	141-145
5	FSL Report	83	204-207

15.After recording of the evidence of the prosecution witnesses was over, the learned Joint District & Additional Sessions Judge, Bharuch explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement under Section-313 of the Code. In their further statement, the accused have denied the case of the prosecution by reiterating that they have been falsely implicated.

16.On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned

Joint District & Additional Sessions Judge, Bharuch has held that contraband article opium was recovered from the appellant – original accused No.1 and the appellants – original accused Nos. 2 to 5 have abetted him in commission of the offence and that the prosecution has been able to establish that the complicity of accused for commission of the offences with which they were charged, have been proved beyond reasonable doubt, and therefore, he recorded the order of conviction and sentence against them to which reference is made in earlier paragraph of this judgment, giving rise to the instant five appeals at the behest of the original accused Nos. 1 to 5.

17. Ms. Sadhna Sagar, learned advocate appearing for the appellants – original accused Nos. 1 to 5 has taken us through the oral as well as documentary evidence which are on record and also assailed the judgment and order of the learned Joint District & Additional Sessions Judge, Bharuch dated 10.03.2003 rendered in Special (NDPS) Case No. 3 of 2001. She has further submitted that the learned Joint District & Additional Sessions Judge, Bharuch has erred in convicting the appellants – original

accused Nos. 1 to 5 though there was no cogent or adequate evidence showing their guilt in the matter. She has further submitted that the learned Joint District & Additional Sessions Judge, Bharuch has failed to appreciate that the appellants – original accused Nos. 1 to 5 have not committed the alleged offence. She has further submitted that the evidence pressed into service by the prosecution is untrustworthy, unreliable and can never form basis of conviction.

18. Ms. Sagar has further submitted that the prosecution has not complied with the provisions contained in Section-42(2) of the NDPS Act. The information was not sent to the immediate superior officer within 72 hours, as required under this provision. Even the learned trial Judge has not taken into consideration that the statutory provisions contained in the NDPS Act have not been complied with. D.S.P. Shri Antani has received the information and yet no entry was made and he has simply passed this information to his Subordinate Officer. The prosecution has failed to prove that when D.S.P. Shri Antani has received the information and from whom the said information has been received. Even the

statutory provisions contained in Sections 52, 55 & 57 have not been complied with. No report has been made to the Magistrate with regard to the seizure of muddamal articles. As per the provisions contained in Section 100, 102, 105 of the Criminal Procedure Code have not been complied with. Local panch witnesses have not been called for. No proper sealing procedure has been adopted and whether muddamal articles were sent to FSL in a sealed condition has also not been proved. There was no evidence to suggest as to whether FSL Officer has gone to Bharuch. The Investigating Officer Mr. Sindhi has not taken any prior permission of the Magistrate before removing the seal on the muddamal article. The way in which the chemical analysis of the muddamal article was made is also not believable. Because of these infirmities in the case of the prosecution, the charge levelled against the accused Nos. 1 to 5 was not proved beyond reasonable doubt and hence, the appellants – original accused Nos. 1 to 5 are required to be acquitted.

19. Over and above this, with regard to accused Nos. 2 to 5, Ms. Sadhna Sagar has submitted that it is not proved

that accused Nos. 2 to 5 were in conscious possession of the contraband article opium. They were simply standing together and the fact that accused Nos. 2 to 5 belong to Rajasthan *ipso facto* cannot lead to a conclusion that they had the knowledge that the bag which original accused No. 1 was carrying contained contraband article, opium. She has, therefore, submitted that there is no evidence against the original accused Nos. 2 to 5 to show that they were in conscious possession of the contraband article opium and, therefore, she contended that Criminal Appeal Nos. 393, 394, 395 & 917 of 2003 filed by accused Nos. 2 to 5 deserves to be allowed and the judgment and order of conviction and sentence passed by the trial court deserves to be quashed and set aside and accused Nos. 2 to 5 may be acquitted of the offence with which they were charged.

20. Even with regard to accused No. 1, Ms. Sadhna Sagar has submitted that the Learned Trial Judge has wrongly convicted the original accused No. 1 along with other accused Nos. 2 to 5 for the offences punishable under Sections 17 & 18 of the NDPS Act as in respect of the same contraband article, they cannot be convicted under

two different Sections. Section 29 has also been wrongly invoked in this case and there is no evidence on record to prove that all the appellants have committed the offence by hatching the criminal conspiracy with each other and each one has abetted and assisted others in commission of such offence. She has, therefore, submitted that the accused No. 1 may be acquitted from the charge of offence punishable under Section 17 & 29 of the NDPS Act.

21. Mr. K.T. Dave, learned Additional Public Prosecutor for the respondent – State of Gujarat in all the five appeals, submitted that by voluminous evidence produced by the prosecution, the complicity of all the five accused is proved beyond reasonable doubt. All five were found near Parwana Hotel and accused No. 1 was carrying with a bag which contained the contraband article. It was well within the knowledge of the remaining accused Nos. 2 to 5. All the five appellants were rightly convicted and sentenced by the trial Court and, therefore, the impugned judgment and order does not warrant any interference of this Court in these appeals. He, therefore, urged to dismiss all the five appeals.

22.Mr. K. T. Dave has further submitted that there was no violation of any statutory provision and all necessary compliances were made by the raiding parties and/or investigating agency and there was no substance in the argument that the statutory provisions were violated. So far as sealing procedure is concerned, Mr. Dave has relied on the decision of the Hon'ble Supreme Court in the case of **Babubhai Odhavji Patel and Others V/s. State of Gujarat, 2005 (8) SCC 725** and submitted that there was no violation of the sealing procedure and it was properly followed by the raiding party and/or Investigating Agency and the conviction of the appellants – original accused Nos. 1 to 5 cannot be disturbed on this ground.

23.Mr. Dave has further submitted that the prosecution has clearly established beyond reasonable doubt the charges against the appellants – original accused Nos. 1 to 5. He has further submitted that it is true that the prosecution case is merely based on the testimonies of the members of the raiding party consisting of the Police Officers and there is no independent corroboration to support the

prosecution version. However, absence of independent corroboration and independent support would not render the prosecution version to be unacceptable in light of the settled legal position. He has further submitted that the documentary evidence on the record of the proceedings clearly establish the involvement, presence and role of the appellants – original accused Nos. 1 to 5 in the offences charged with. He has further submitted that all the mandatory provisions contained in the Act have been fully complied with by the members of the raiding party and, therefore, the prosecution having clearly established beyond reasonable doubt the guilt of the appellants – original accused Nos. 1 to 5, the conviction order passed by the learned Joint District & Additional Sessions Judge, Bharuch is required to be upheld.

24. We have considered the submissions advanced by Ms. Sadhna Sagar, learned advocate appearing for the appellants - original accused Nos. 1 to 5 and Mr. K. T. Dave, learned Additional Public Prosecutor, appearing for the State of Gujarat at length. We have also undertaken a complete and comprehensive exercise of appreciating all vital features of the case and the entire

evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to the impugned judgment and order passed by the learned Joint District & Additional Sessions Judge, Bharuch convicting the appellants-accused Nos. 1 to 5 sentencing them for R.I of 10 years and fine of Rs.1 lac each and in default thereof, to undergo further R.I of 2 years.

25. In order to find out whether the prosecution has established the charge against the appellants – original accused Nos. 1 to 5 beyond reasonable doubt and whether the learned Joint District & Additional Sessions Judge, Bharuch has recorded a just and correct conclusion holding the appellants – original accused Nos. 1 to 5 guilty, we may first advert to the oral testimony of the prosecution witnesses.

26. The prosecution has examined P.W. 1 – Mr. G. N. Chavda. He is the Investigating Officer as well as the complainant. D.S.P. Shri Antani has given the information to P.W. 1 – Mr. Chavda and on the basis of

that information, he has investigated the entire case and his oral evidence supports the case of the prosecution. FSL Report proves that the contraband article found from the possession of accused No. 1 is opium. FSL Officer has also been examined and he also supported the case of the prosecution. Simply because Panchas have turned hostile, it would not be fatal to the prosecution case. The prosecution has also examined Vinodbhai who has weighed the contraband article and he supported the case of the prosecution. Other police officials have also been examined and no contradiction was found from their depositions. FSL Officer has examined the muddamal articles at the place of incident. It is proved by leading oral as well as documentary evidence that the contraband article was properly sealed and it reached to FSL in a sealed condition. The cashier of Parvana Hotel has also been examined as an independent witness. All prosecution witnesses have identified the accused Nos. 1 to 5. From the evidence of these witnesses examined by the prosecution, it is seen that they have justified before the Court as to what role they played in the raid.

27. So far as the statutory provisions contained under Section 42 (1) of the NDPS Act is concerned, it deals with power of entry, search, seizure and arrest without warrant or authorization in a building, conveyance or enclosed place, between sunrise and sunset. So far as Section 42 (2) of the NDPS Act is concerned, it provides that where an officer takes down any information in writing under sub-section (1) of section 42 of the NDPS Act or records grounds for his belief under the provisos thereto, he shall forthwith send a copy thereof to his immediate official superior.

28. Section 43 of the NDPS Act provides for Power of seizure and arrest in public places. The accused were intercepted and caught hold at the place near Parvana Hotel which is a public place and, therefore, in the instant case, admittedly Section 43 of the NDPS Act has to be invoked and not Section 42 of the NDPS Act.

29. In the case of **State of Punjab v. Balbirsingh, AIR 1994 SC 1872**, the Supreme Court has observed that Section 43 which deals with the power of seizure and arrest in public places is slightly different from section

42 of the NDPS Act in certain respects. The empowered officer while acting under section 43, need not record any reasons of his belief. Section 43 also does not mention anything about the empowered officer having prior information given by any person or about recording the same, as compared to section 42. A similar view is expressed by this court in the case of **State of Gujarat v. Abdul Rasid Ibrahim Mansuri, 1991 Drugs Cases 1 (Gujarat)**. In the said case the prosecution case was that the accused was found at public premises. At the same time, it was not the defence of the accused that he was at some place other than public premises. So legal position is clear that section 43 of the NDPS Act would be applicable to the facts of that case.

30. In view of the aforesaid clear elucidation of the Supreme Court and this Court as well as testimonies, in instant case, provisions of Section 43 would be applied as the raid was carried out at a public place. Notwithstanding the aforementioned legal position, the secret information was reduced into writing and it was immediately communicated to the official superior as can be reflected from the documentary evidence on record. Therefore,

the compliance of the mandatory provisions of section 42 of the NDPS Act though not required, they have been fully complied with.

31. So far as the compliance of the mandatory provisions of Section 50 of the NDPS Act is concerned, the evidence is consistent. At the time of interception and raid, P.I. Chavda had informed the accused No. 1 that if he so desired, he could be searched in presence of a gazetted officer or a magistrate or if he desired that he may be searched by him, then he will search him and the option was left to the accused and the accused preferred the second option and volunteered to be searched by him. Therefore, Mr. Chavda, in presence of the panchas and other police personnels who were members of the raiding party, searched the person of the accused and during the search he found contraband article from the accused.

32. So far as the journey of the muddamal from the stage of interception of the accused, search of the person of the accused and seizure and sealing of contraband article till it reached FSL has also been duly proved and all the

witnesses, in this regard, are consistent. As per the said evidence, the muddamal was not tampered with at any stage and it reached FSL intact in sealed condition. The procedure for sealing was done as per the practice adopted by the police in NDPS cases. FSL report clearly shows that the muddamal was sealed and in intact condition. It is also clear from the FSL report that it was received by FSL intact in sealed condition and on analysis of the muddamal it was found to be opium. Therefore, during journey of the muddamal from seizure and sealing till it reached FSL for analysis, there was no question of tampering with the said muddamal.

33. Independently, this Court has also perused the documents on record and from the perusal of the same it is clear that the raiding party and/or Investigating Officer, has strictly followed the mandatory and statutory provisions contained under the NDPS Act and no discrepancy could be noticed by this court on the part of raiding party and/or Investigating Officer with regard to compliance of the provisions of NDPS Act.

34. On overall view of the matter, according to this Court,

the mandatory and statutory provisions contained under Sections 42 (1), 42 (2), 43, 50, 55 and 57 of the NDPS Act have been adhered to and complied with by raiding party and/or Investigating Officer, and it is duly proved by the evidence of the prosecution witnesses. Raiding party and/or Investigating Officer, had taken utmost care and caution while seizing and sealing the said contraband article. The apprehension of tampering with the muddamal can be ruled out as from the stage of recovery of the muddamal till its reaching the FSL, proper care and caution was taken by the police personnel. It is on the contrary clearly proved that it was in the safe hands of police personnel and it reached at FSL intact in sealed condition for chemical analysis.

35. In view of the aforesaid evidence, there is no manner of doubt that when the appellants – original accused Nos. 1 to 5 were intercepted, apprehended and searched, the accused No. 1 was found in possession of contraband article opium. Necessary formalities of search and seizure were complied with in presence of panchas and the statutory requirements and formalities contained under the NDPS Act were followed and the sample was

sent to FSL for analysis after following the procedures under the NDPS Act.

36. On close scrutiny of the evidence on record, so far as the accused No. 1 is concerned, we find no infirmities in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the trial court subject to minor modification in default sentence qua the offence punishable under Section 18 of the NDPS Act is concerned. However, no case is made out for punishing him under Sections 17 & 29 of the NDPS Act. We are, therefore, though in complete agreement with the said findings, ultimate conclusion and resultant order of conviction under Section 18 of NDPS Act, we reverse the finding so far as conviction and sentence under Section 17 & 29 of the NDPS Act is concerned and acquit the accused No.1 from the charge of offence punishable under Sections 17 & 29 of the NDPS Act. While upholding the order of conviction and sentence of R.I. Of 10 years under Section 18 of the NDPS Act, we slightly modify the order in respect of default of fine. Hence, in default of fine of Rs. 1 Lac, the sentence of R.I. of 2 years is reduced to one year looking to the facts and circumstances of the case.

37. So far as accused Nos. 2 to 5 are concerned, admittedly, the bag was not found from them. It is true that they were in the company of the accused No. 1. But simply because they were in his company, it cannot be presumed that they have hatched the conspiracy and abetted him in commission of the crime. Even knowledge that the accused No. 1 was having contraband article with him also cannot be presumed in absence of any cogent and concrete evidence brought on record by the prosecution.

38. In the case of **State of Punjab V/s. Balkar Singh and another, (2004) 3 S.C.C. 582,** the accused were alleged to have been found present at the place where about 100 bags of poppy husk were recovered. They were sitting on such bags and they have failed to give any satisfactory explanation for being present at that place. The Supreme Court held that mere being found to be present at the place where the poppy husk bags were found and the failure to give any satisfactory explanation for being so present did not prove that the accused persons were in possession of the said poppy husk bags.

39. In the case of **Sorabkhan Gandhkhan Pathan and another vs. State of Gujarat, reported in (2004) 13 Supreme Court Cases 608,** the Supreme Court has acquitted the accused No. 2 who was travelling in an auto-rickshaw by holding that no material was produced to establish that the accused No.2 in that case had knowledge that accused No.1 was carrying contraband articles or was conniving with the said accused in carrying the contraband articles and hence conviction of accused No.2, in absence of any such material, only on the basis of his being in the auto-rickshaw was not sustainable.

40. In the case of **Narcotics Control Bureau, Jodhpur V/s. Murlidhar Soni and others, (2004) 5 S.C.C. 151,** the Supreme Court was concerned with a case where accused's father (since died) was carrying a cloth bundle containing contraband, and the role of the accused was only to take his father on his scooter to the place where they were allegedly arrested. There was no evidence showing that accused had knowledge that the bundle contained any contraband articles. In absence of

any material showing conscious possession of the contraband by the accused and the accused's father being dead, it was held that accused cannot be said to be in possession of any contraband articles and hence, his conviction under Section 21 was rightly set aside by the High Court. The Court was also in agreement with the finding of the High Court that the statements of the accused persons have been obtained by the Prosecuting Agency under duress.

41. Applying the principals laid down by the Supreme court in the above referred to three judgments to the facts of instant case, it is true that accused Nos. 2 to 5 were with the accused No. 1 near Parvana Hotel. From this, it cannot be deduced that original accused Nos. 2 to 5 had knowledge about presence of contraband article in the bag possessed by the original accused No. 1 and there is no evidence to conclude that accused No. 1 had any relation with accused Nos. 2 to 5 and they cannot be connected with the crime simply on the basis that the police had received information that five persons were coming from Rajasthan for delivery of the contraband article opium. Therefore, in our opinion, since the

prosecution has not placed any material on record to show the relation between accused No. 1 on the one hand and accused Nos. 2 to 5 on the other hand and the conscious possession of the bag containing contraband article opium so far as accused Nos. 2 to 5 is concerned, complicity of accused Nos. 2 to 5 is not established and, therefore, accused Nos. 2 to 5 deserve benefit of doubt.

42. In sum and substance, conscious possession of contraband article opium with accused Nos. 2 to 5 is not established beyond reasonable doubt and, therefore, this court deems it expedient to accord benefit of doubt to accused Nos. 2 to 5 and the resultant effect of this conclusion would be that the impugned judgment and order of conviction and sentence of accused Nos. 2 to 5 for commission of offence under Section 17, 18 read with Section 29 of the NDPS Act, 1985 deserves to be quashed and set aside by allowing the Criminal Appeal Nos. 393, 394, 395 & 917 of 2003 filed by accused Nos. 2 to 5 and thereby acquitting the original accused Nos. 2 to 5 of the offences with which they were charged.

43. For the foregoing reasons, Criminal Appeal No.317 of

2003 filed by accused No. 1 i.e. Mukesh Mangilal Acharya is partly allowed. The conviction and sentence imposed on accused No.1 under Section 18 of the NDPS Act is confirmed and maintained. However, with a slight modification that in default of payment of fine of Rs.1 lakh, the sentence to suffer RI for two years shall stand modified and instead of RI for two years, he shall suffer RI for one year in default of payment of fine. The conviction and sentence recorded against accused No. 1 under Sections 17 & 29 of the NDPS Act is quashed and set aside.

44. So far as Criminal Appeal Nos. 393, 394, 395 & 917 of 2003 filed by accused Nos. 2 to 5 i.e. Bhaktawar, Chhaganlal, Hemraj and Bherulal are concerned, all these appeals are allowed, the result of which is that the impugned judgment and order of conviction and sentence for the offence punishable under Section 17 & 18 read with Section 29 of the NDPS Act, 1985 is quashed and set aside and they are acquitted of the offences with which they were charged. The accused Nos. 2 to 5 are in jail. Therefore, they are ordered to be set at liberty forthwith if their presence is not required

in connection with any other case. Fine, if any paid by them, shall be refunded to them forthwith.

[A. M. KAPADIA, J.]

[K. A. PUJ, J.]

Savariya